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In The Supreme Court Of The United States

OCTOBER TERM, 1996

ROBERT JESSE SMALLWOOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. There exists conflicting circuit law concerning the ambiguous sentencing guidelines applied to methamphetamine calculations which requires this court to intercede and resolve same.

II. Whether or not the burden can be shifted to a defendant in a Petition for Habeas Corpus relief that was an original burden of the government, and but for ineffective assistance of counsel in putting the government to its burden, and the government being required to do so, Petitioner's Fifth and Sixth Amendment rights were violated.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Fifth Circuit:

1. **ROBERT JESSE SMALLWOOD**, *Defendant/Appellant/Petitioner;*

2. **UNITED STATES OF AMERICA**, *Plaintiff/Appellee/Respondent.*

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OPINIONS BELOW

As to the denial of Petitioners §2255 Motion, there are no other reports or opinions, other than the Fifth Circuit Opinion and District Courts' Orders, which can be found in the Appendix, beginning at A1. However, Petitioner did have his direct appeals denied by the Fifth Circuit in ***United States v. Smallwood***, (unpublished), and ***United States v. Smallwood***, 920 F.2d 1231 (5th Cir.), ***cert. denied***, 501 U.S. 1238 (1991).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Given the Per Curium Opinion of the United States Court of Appeals for the Fifth Circuit, dated and entered on September 25, 1996, and the subsequent Mandate, the jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. §1254(1).

The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part, Title 28 U.S.C. §2255 states:

> *"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, ..., or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence...An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."*

In pertinent part, the Sixth Amendment to the United States Constitution recites:

> *"In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defense."*

Due process requirement under the Fifth Amendment of the Constitution of the United States in that no person shall...be deprived of life, liberty or property without due process of law.

STATEMENT OF THE CASE

This case deals with the denial of a Motion, made pursuant to 28 U.S.C. § 2255, in which Petitioner challenged the sentences from two prior cases in which the sentencing determinations were based on the underlying conduct involving methamphetamine.

First, in ***Case No. SA-88-308(1)***, Petitioner was charged with the following: Count 1 - *Unlawfully, Willfully and Knowingly Conspiring to Manufacture Methamphetamine*, in violation of Title 21 U.S.C. §841(a)(1) and 21 U.S.C. §846; and Count 2 - *Unlawfully, Knowingly and Intentionally Possessing With Intent to Distribute a Quantity of Methamphetamine, in* violation of Title 21 U.S.C. §841(a)(1). A Superseding Indictment was filed on May 10, 1989 adding a third count which charged Petitioner with *Aiding and Abetting the Distribution of a Quantity of Amphetamines*, in violation of Title 21 U.S.C. §841(a)(1) and 18 U.S.C. §2.

This Indictment stemmed from an investigation by the Drug Enforcement Administration (DEA), in which it was learned that Petitioner and another individual were selling methamphetamine. This investigation resulted in the completion of a controlled buy, in which an undercover agent negotiated, and received, twenty-six (26) grams of thirty four percent (34%) pure methamphetamine.

Petitioner pleaded guilty to Count 2 of the Indictment, and the other two (2) counts were dismissed. During the sentencing, the trial court accepted the conclusion in the PSR that the base offense level was 34. The PSR indicated that the phenylacetic acid that was seized could produce a practical yield of 30 pounds of methamphetamine. Using the drug equivalency table to convert the practical yield amount and the amount of actual methamphetamine seized, to an equivalent amount of cocaine, the base offense level of 34 was reached. The trial court rejected the argument of Petitioner's attorney that the inclusion of the precursor chemicals was error because not all chemicals needed to manufacture methamphetamine were present.

Petitioner was then sentenced to 168 months' imprisonment. Petitioner filed a timely *Notice of Appeal* and appealed his case to the Fifth Circuit Court of Appeals. This appeal raised the issue of relevant conduct relating to the quantity of drugs asserted to be applicable for the calculation of the guidelines. The Appellate Court, in its unpublished opinion, affirmed the lower court's conviction. However, neither the appeal itself, nor the opinion of the Appellate Court, addressed the *type* of methamphetamine possessed or seized, as this was not raised by counsel at the time of sentencing.

In ***Case No. SA-89-301(1)***, Petitioner was charged in a Three-Count Indictment with the following: Count 1- *Aiding and Abetting* a violation involving a violation of 21 U.S.C. §841(a)(1), in violation of 18 U.S.C. §2;

Count 2 - *Manufacturing of Methamphetamine,* in violation of 21 U.S.C. §§846 and 841(a)(1); and Count 3 - *Possession of Phenylacetic Acid with Intent to Manufacture a Quantity of Methamphetamine*, in violation of 18 U.S.C. §2, involving the violation of 21 U.S.C. §841(d)(1).

This Indictment resulted from a search warrant that was executed at a Bandera County residence occupied by Petitioner and his live-in girlfriend. Seized during the execution of the search warrant was methamphetamine powder, methamphetamine oil, precursor chemicals, and equipment utilized in the manufacture of methamphetamine. Approximately 93 lbs. of phenylacetic acid, a precursor chemical utilized in the manufacture of methamphetamine, was seized at the residence, as well as drug ledgers and formulas for the manufacture of methamphetamine.

Petitioner pleaded guilty to Count 3 of this Indictment in return for the dismissal of Counts 1 and 2. During the sentencing phase of this case, the trial court adopted the calculation of the base offense level as set forth in the PSR. The phenylacetic acid seized was said to produce a practical yield of 15 pounds of methamphetamine which, when converted in the drug equivalency tables to cocaine, established a base offense level of 32. The same objection of Petitioner's attorney to the calculation (i.e., that not all chemicals needed to manufacture methamphetamine were present) was overruled. Petitioner was then sentenced to a term of 120 months,

to run consecutive to the 168-month sentence imposed in Case No. 88-CR-308. Petitioner also appealed this conviction.. An opinion affirming the district court's decisions was rendered in ***United States v. Smallwood***, 920 F.2d 1231 (5th Cir.), ***cert. denied***, 501 U.S. 1238 (1991).

On February of 1995, Petitioner filed, as to both of the aforementioned cases, separate Motions to Vacate, Set Aside, or Correct Sentence pursuant to Title 28 U.S.C. § 2255. These Motions asserted that, in both cases, counsel, at plea and sentencing, was ineffective for (1) failing to object to the trial court's calculation at sentencing of the base offense level without determining whether the methamphetamine was l-methamphetamine or d-methamphetamine; and (2) failing to argue to the court that using a theoretical yield of methamphetamine projected from a certain amount of precursor chemicals is not an appropriate method of computing the base offense level as isomers of methamphetamine.

On June 16, 1995, the Honorable Magistrate Judge Primomo issued a memorandum and recommendation combining the decisions in Case No. SA-88-CR-308(1) and SA-89-CR-301(1). A copy of the Magistrate's combined report went to each of the different judges who sat on Petitioner's original cases.

The Magistrate's Report and Recommendation found that Petitioner had made a showing that counsel was deficient in failing to address the type of

methamphetamine used to calculate the sentencing guidelines. However, the Magistrate stated that, even though the government carried the burden to establish the isomer of methamphetamine, the burden had now shifted, because of the Petition for 2255 relief, and Petitioner had to assert some type of meaningful projection that the substance involved in his offense was l-methamphetamine. The Magistrate took this stance from the Fifth Circuit decision in ***United States v. Acklen***, 47 F.3d 743 (5th Cir. 1995). The Magistrate's report suggested that the reason the § 2255 petition failed was because Petitioner did not make an adequate showing that l-methamphetamine was part of a production process of the chemicals seized. Therefore, instead of the original government burden to prove the type of methamphetamine, Petitioner had to make such a showing. Again, as this court determined in ***Acklen***, the shifting of the burden sets the stage for this type of abuse in the system to continue.

Timely objections to the magistrate report were filed on June 26, 1995. An order denying relief in Case No. SA-88-CR-308(1) was issued by the Honorable Judge Garcia on July 27, 1995, and on August 7, 1995, the Honorable Judge Suttle issued an order denying relief in Case No. SA-89-CR-301(1).

A timely Notice of Appeal was filed on both 2255 petitions. The Fifth Circuit Court of Appeals allowed a joint briefing of the two (2) cases for appellate purposes.

In the appeal, Petitioner set forth, as support of his position, the following arguments:

First, the government has the burden to prove what type of isomer is present in the methamphetamine that can be produced from chemicals seized. If the government has never been put to that burden because defense counsel did not adequately represent the issue, the prejudice is presumed. However, when a petitioner is presenting his case on ineffective assistance of counsel, in a post-conviction motion pursuant to 28 U.S.C. 2255, the government is no longer required to prove its original burden. If this type of system continues to prevail, then prosecutors will blatantly abuse the lack of experience of criminal defense lawyers as a means in which to avoid having to establish proof and meet their burden for cases similar to this, thus circumventing this requirement by merely ignoring the existence of it, and letting defense counsel fall on their face. The government knows then, based upon the Fifth Circuit's decision in ***Acklen***, supra, that the litigation of such an issue would be favorable but that the burden would shift to a defendant. This is unconscionable.

It would be a miscarriage of justice to shift this burden, based upon post-conviction relief, and suggests that there is nothing meaningful in the government's requirement to actually show that it was not l-methamphetamine. Irrespective of this conflict of the burden of proof shifting to Petitioner, he has met his burden. The government has shown no contradictory

evidence to suggest that Petitioner could not prevail on his claim. Here, the government has offered no rebuttal evidence suggesting that the case, as presented by Petitioner, would, in fact, not be correct.

The Magistrate's Report stated that Petitioner had the opportunity to meet his burden concerning the classification of l-methamphetamine and phenylacetic acid that was seized, that this was the production of potential for the phenylacetic acid. In fact, in the multiple pleadings of Petitioner, he not only showed that there is chemical analysis information supporting this consideration, but there was no chemical or scientific information supplied by the government to contradict same. The government never refuted that P2P, the phenylacetic acid, or any other chemical seized, could not produce both d- and l-methamphetamine. Petitioner also showed the weight of the evidence that was identifiable in his case was consistent with other case law supporting the application of l-methamphetamine. More importantly, under the decision of ***United States v. Bogusz***, 43 F.3d 82, 87 (3rd Cir. 1994), the Third Circuit determined that there is a d-l mixture which would then allow for a determination of the amount of d- represented in the methamphetamine to produce a different sentencing disposition. In more recent cases, such as ***United States v. Burt***, 76 F.3d 1064 (9th Cir. 1996), the Ninth Circuit determined it was "plain error" to not have an evidentiary hearing and make a finding on the record of the determinations of d- or l-methamphetamine.

In a Per Curiam Opinion, dated September 25, 1996, the Fifth Circuit affirmed the decision of the district court by, essentially, adopting the reasons set forth by the lower court.

ARGUMENT

A. The conflicting circuit law concerning the ambiguous sentencing guidelines applies to methamphetamine calculations based on the type of isomer require this court to intercede and resolve same.

The Federal Sentencing Guidelines, applicable to Petitioner at the time of his sentence (pre-November 1, 1991), identified methamphetamine in two specific ways: (1) methamphetamine, which one gram would equal 5.0 grams of cocaine/1.0 gram of heroin; or (2) *l*-methamphetamine/Levo-methamphetamine/*l*-dexoephedrine, which one gram would equal .2 grams of cocaine, or .04 grams of heroin. This distinguishing feature of the Sentencing Guidelines is unique and requires a sentencing analysis that directly relates to these two distinctions by identifying the isomer for which a defendant should be sentenced. Without the identification, the rule of lenity must apply, and a defendant who experiences this distinguishing problem should be granted the appropriate sentence consistent

with a finding of l-methamphetamine.[1] The ambiguity of the term 'methamphetamine' and the distinguishing feature of *l*-methamphetamine clearly suggests that this would have to be the outcome where no methamphetamine was seized or produced. Ambiguities are construed in favor of defendants who must suffer at the hands of those ambiguities to harsher penalties. It is not a defendant's fault that the guidelines are ambiguous, nor is it his fault that, under this rule, he would gain some benefit. Because there is a distinction between the term 'methamphetamine' and '*l*-methamphetamine', yet chemists agree that both are classified as methamphetamines, the rule of lenity must prevail.

Courts have held that the term "methamphetamine" standing alone cannot lead to the inference that the most serious type of methamphetamine should be used for calculating a sentence. Rather, the government bears the burden of proving what type of methamphetamine would be applicable. See ***United States v. Jennings***, 12 F.3d 836 (8th Cir. 1994). When no methamphetamine can be identified the rule of lenity comes into play. Thus, the term "pure methamphetamine" is a misnomer, and cannot be distinguished without a polarity test or other laboratory tests conducted on the methamphetamine itself. ***United***

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[1] After 1991, the guidelines expanded the methamphetamine sentence to three (3) different ambiguous classifications, making the problem even worse.

States v. Deninno, 29 F.3d 572 (10th Cir. 1994) clarified this issue even more specifically, *"When criminal offense made no distinction between types of methamphetamine, it could not be assessed for sentencing purposes that defendant was convicted of D-methamphetamine rather than L-methamphetamine."* ***Deninno*** at 580.

The rule of lenity must apply when there is ambiguity in a statute or the guidelines. In ***United States v. Bass***, 404 U.S. 336, 30 L.Ed.2d 488, 92 S.Ct. 515 *"First we have recently affirmed, ambiguity concerning the ambient of criminal statutes should be resolved in favor of lenity."* ***Lewis v. United States***, 401 U.S. 808, 812, 91 S.Ct. 1056 (1971) *"When choices have to be made between two readings of what conduct the Congress had made in crime, it is appropriate, before we choose a harsher alternative, to require that Congress should have spoken in language that was clear and definite.* ***United States v. Universal C.I.T. Credit Corp.***, 344 U.S. 218, 221-222, 73 S.Ct. 227 (1952). This principle is founded on two policies that have long been part of our tradition. *"First, a fair wording should be given to the world on language the common world would understand of what the language intended to do if a certain line is passed. To make the wording fair so far as possible, the line should be clear.* ***See McBoyle v. United States***, *283 U.S. 25, 51 S.Ct. 340 (1931). Second, because of the seriousness of the criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures, not courts,*

should define criminal activity." This policy embodies *"the instinctive distaste against men languishing in prison unless a lawmaker has clearly said they should."* Where there is ambiguity in a criminal statute, or in a criminal penalty as defined by the Sentencing Guidelines, doubt should be resolved in favor of the defendant.

During the course of Petitioner's evidentiary proceedings a defense chemist, a DEA Agent, and a government chemist testified. Of significance to all of this is the fact that there exists no lab report identifying the methamphetamine isomer, and that the testimony establishes three classifications of methamphetamine isomer, the pure *d*-methamphetamine isomer, the pure *l*-methamphetamine isomer, and the *d-l* methamphetamine combination of the *d-l* isomer, none of which could be established to be present. Thus, the rule of lenity must prevail.[2]

The testimony in this case is clear. The defense chemist testified that it was possible from the chemicals that had been identified in this case to get an *l*-methamphetamine isomer. When distinguishing all of the isomers, the defense chemist also stated that they were all known generically as just "methamphetamine", so that

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[2] Even if you suggest that *d-l* methamphetamine is the primary combination of isomers produced in clandestine laboratories, you still cannot say that this is pure *d*-methamphetamine.

l-methamphetamine could be referred to as methamphetamine without identifying the isomer.

Even the government, in an attempt to present some theoretical concept of methamphetamine production, testified that even the glassware seized in this case could be used to produce *l*-methamphetamine. Throughout the government's attempts to present hypothetical conditions to the defense chemist, none of what the government presented reflected upon facts, nor evidence, in this case. Significant to all of this is the fact that, even with these hypotheticals, the substances identified still would not make methamphetamine.

The government's first witness, DEA Agent Embry, testified that none of the chemicals seized were tested. Embry also could not testify to the type of methamphetamine as no tests were done to distinguish the isomer. Embry also admitted, while not having been taught anything about the marketability of *l*-methamphetamine, to the marketability of *l*-methamphetamine, if it were produced. Embry's admissions showed specifically that there was no lab report that related to Petitioner, or that distinguished the type of methamphetamine in this case.

The government's second witness was a DEA Chemist from Miami.[3] This chemist testified to a

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[3] Both the defense chemist and the DEA chemist were not opposed by the government or defense counsel

number of chemical analyses relating to how to obtain P2P, and what precursor chemicals were necessary to get to P2P in order to, then, produce methamphetamine. The chemist suggested that if all of the assumptions being presented were perfected, and if methamphetamine were produced, it would be a *d-l* combination of the two distinguished isomers. He also testified to an actual yield versus a practical yield. An actual yield, as testified by the defense chemist, is a more realistic yield of a quantity of drugs that may result in clandestine laboratories.

The government chemist agreed that the process of producing methamphetamine in a *d-l* combination can also be separated to pure *d*- or pure *l*- methamphetamine. Even the quantity of drugs discussed at the evidentiary hearing were distorted because of assumptions being presented were not connected to Petitioner's evidenee. However, what was connected to evidence was the fact that nobody could produce a lab repc:t. The distinguishing feature in the l- and *d*-methamphetamine isomer are critical to sentencing. Therefore, all of the smoke and mirrors that were presented cannot overcome the application of the rule of lenity to the sentencing proceeding in this case.

The DEA chemist states that he did not test any of the substances in Petitioner's case, nor did he test any of the chemicals seized. He neither saw a lab report, or any

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as to their expertise and ability to testify concerning chemical analyses regarding methamphetamine cases.

other information that would suggest that the methamphetamine in this case could not, or was not, *l*-methamphetamine. The DEA Chemist also admits that clandestine laboratories can produce *l*-methamphetamine. Of great significance, however, is the DEA chemists' own statement that he did not know what method of production was used in this case, and therefore, could not determine the type of methamphetamine produced. The DEA chemist also testified that even the P2P could have produced amphetamine, and not knowing the production process used, could not determine what type of amphetamine or methamphetamine was to be produced.

When asked *"all of the processes that Mr. Gillespie (AUSA) asked you to assume, you know of none of those that actually occurred, is that correct?"* The government's chemist answered, *"I don't have any personal knowledge that they did occur."* The DEA chemist also did not know what type of chemicals were produced in this case, nor whether ephedrine could have been present to produce an *l*-methamphetamine, or a *d*-methamphetamine, or whether P2P was the process used in a clandestine laboratory related to Appellant to produce *d*-, *l*-, or *d-l* methamphetamine.

The evidence also showed that what was seized, including a formula, was not a formula for methamphetamine, and that some of the seized material had nothing to do with Petitioner's case, or related to it.

Prior to 1991, the two conflicts were l- and d-methamphetamine isomers of the substance produced which would have allowed one gram of l-methamphetamine to equal 40 kilograms of marijuana while one gram of pure methamphetamine (or d-methamphetamine) would require a ten (10) kilogram of marijuana application multiplication to the amount of drugs used for sentencing purposes.

In ***United States v. Swanson***, 943 F.2d 1070, 1072 (9th Cir. 1991), the Ninth Circuit held that when an attorney admitted his client's guilt during closing argument, the attorney was ineffective as he failed to require the government to meet its burden of proving guilt beyond a reasonable doubt. By failing to hold the government to its burden, the criminal defendant is denied due process of law. ***Swanson***, 943 F.2d at 1073.

In ***United States v. Carroll***, 6 F.3d 735 (11th Cir. 1993), experts who testified agreed that there were three (3) different types of methamphetamine forms. The l-methamphetamine, which was described as an inner form, d-methamphetamine, and d-l methamphetamine, which is composed of fifty percent (50%) l-methamphetamine and fifty percent (50%) d-methamphetamine. Though the issue in ***Carroll*** focused on distinction for sentencing guideline purposes between pure methamphetamine and methamphetamine, the court also considered the issue for appropriate guideline levels for a substance that was neither d-methamphetamine or pure l-methamphetamine, but a mixture of the two.

Additional cases have cited this same conflict. ***See United States v. Patrick***, 983 F.2d 206 (11th Cir. 1993); ***United States v. Koonce***, 884 F.2d 349 (8th Cir. 1989); and ***United States v. Wessels***, 12 F.3d 746 (8th Cir. 1993). In each of these cases the defendant challenged the government's contention that the methamphetamine was d-methamphetamine or actual methamphetamine which carried the most severe sanction possible in the weight analysis table as set forth in the Federal Sentencing Guideline Manual. D-methamphetamine and actual methamphetamine are also distinguished in the guidelines. (U.S.S.G. 2D1.1, p. 111). Courts have held that the term "methamphetamine" standing alone cannot lead to the inference that the most serious type of methamphetamine should be used for calculating a sentence.[4]

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[4] In the case of ***Hearn v. United States***, Civil Action 93-0460-R, United States District Court for the Western District of Virginia, Roanoke Division, the government agreed that because the distinction in L- and D-methamphetamine was not resolved at petitioner's sentencing that remand and resentencing was appropriate in light of the impact this concept has on the overall sentence to be imposed. Reading from the presenter's response to 2255 petition, as follows:

> *"Hearn points out correctly that, for sentencing guideline purposes, there is a difference between methamphetamine and L-methamphetamine. Hearn points out, correctly, that had he been sentenced for*

Additionally, a substance which is pure d-methamphetamine is difficult to produce. Drug Enforcement Agents have testified on behalf of the government in other cases that the majority of street methamphetamine or clandestine lab methamphetamine

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> *L-methamphetamine, his guidelines would have been Level 28...he was sentenced for methamphetamine at Level 34...DEA did not test for the distinction between the two in 1988... No one involved in Hearn's sentencing process at the time knew about or interested in the chemical difference, or the sentencing guidelines' difference as to the two related substances, both generically methamphetamine...Drugs are long since destroyed so retesting could not render the issue harmless...Therefore, the United States concedes that Hearn was not provided with and did not achieve the benefit of a piece of information that materially affected sentencing...Wherefore, the United States would move that Petitioner Hearn be resentenced as though the substance involved was L-methamphetamine. Hearn would thus be subjected to resentencing at Level 28."*

This answer to the habeas petition on Hearn's behalf from the government resulted in Mr. Hearn's resentencing.

will be d-l methamphetamine. *See also Carroll*, 6 F.3d at 745.

These conflicting terms are unresolved and there are a number of cases whose results have provided varying interpretations of the law. See, e.g., *United States v. Decker*, 55 F.3d 1509 (10th Cir.), *United States v. Carroll*, 6 F.3d 735 (11th Cir.), *United States v. Cudemo*, Case No. 94-1442 (3rd Cir.), *United States v. Cook*, 49 F.3d 663 (10th Cir.), *United States v. James*, 915 F.Supp. 1092 (S. Dist. of CA), *United States v. Lande*, 40 F.3d 329 (10th Cir.), *United States v. Seyfert*, 67 F.3d 544 (5th Cir.), *Lambert v. United States*, 908 F.Supp. 356 (W. Dist. of VA), *United States v. Bohn*, (E. Dist. of PA), *United States v. Acklen*, 47 F.3d 739 (5th Cir.), *United States v. Deninno*, 29 F.3d 572 (10th Cir.), *United States v. McCusker*, (E. Dist. of PA), *United States v. Patrick*, 983 F.2d 206 (11th Cir.), *United States v. Blankenship*, 906 F. Supp. 461 (7th Cir.), *United States v. DeJulius*, (E. Dist. of PA), *United States v. Williams*, 914 F.Supp. 1342 (4th Cir.), *United States v. Sieruc*, (E. Dist. of PA), *United States v. Allison*, 63 F.3d 350 (5th Cir.), *United States v. Carter*, (E. Dist. of PA), *United States v. Durham*, 941 F.2d 886 (9th Cir.), *United States v. Wessels*, 12 F.3d 746 (8th Cir. 1993), *United States v. Smallwood*, Case No. 95-50619/50659 (5th Cir.), *United States v. Etter*, Case No. 95-3260 (8th Cir.).

B. Whether or not the burden can be shifted to a defendant in a Petition for Habeas Corpus

relief that was an original burden of the government, and but for ineffective assistance of counsel in putting the government to its test, and the government being put to the test of its burden, Petitioner's rights were violated.

The ineffective assistance of counsel claim raised in the case before the Fifth Circuit specifically spoke to sentencing counsel's failure to force the government to be put to the burden of proving what type of drug was involved for sentencing purposes. The case law is clear concerning this particular aspect of Petitioner's case. More importantly, the government's burden cannot simply be ignored because the court, the prosecution, and defense counsel all failed to require the government to fulfill its obligations under the law at sentencing. Petitioner is overburdened, in violation of his due process rights, by having to prove, or disprove, a non-existing event. By switching the burden from the government to Petitioner, the government did not have to fulfill its obligation under the laws of the United States. More importantly, the ambiguity in the sentencing guidelines have no relationship to this issue of statutory structure. Finally, this argument is not "novel" as the Fifth Circuit might suggest in ***United States v. Seifert***, 67 F.3d 544, 549 (5th Cir. 1995). The argument existed at the time Petitioner's case was initiated. Many attorneys did not understand the full scope of the guidelines or how they would interplay with the

statutes, and thus could easily have been ineffective in failing to protect the defendant's due process rights. Novel arguments are the very source and strength of our legal system and to ignore them against a defendant's constitutional rights borders on the absurd.

Petitioner's counsel was ineffective in failing to recognize the distinguishing feature of the Drug Equivalency Table for different classification of methamphetamine isomers. As a result, the Defendant was sentenced as if the methamphetamine involved in the instant case was a pure *d*-methamphetamine with the highest level of sentencing disposition under the Drug Equivalency Table of 2D1.1.

At the initial stages of any sentencing proceeding concerning this type of issue, it is the government's burden to prove the type of methamphetamine involved. The government never initiated this first stage of proceedings at the Petitioner's sentencing, and counsel never objected to this error. Thus, counsel was ineffective from the beginning, and the error was aggrieved by the district court failing to require the government to carry its burden in the first place.

When the Petitioner filed a 2255, he was required to make a showing of ineffective assistance of counsel relevant to the issues raised. He made that showing and this court remanded this case for reconsideration. The problem that arose, however,

was the shifting of the original burden that set the stage for the 2255 in the first place. Though Petitioner believes that he has met that burden, there is a question of law that arises on whether or not the burden should have been Petitioner's in light of the ineffective assistance claim in the first place.

The government has the burden of proving that the controlled substance involved was methamphetamine. In other words, to convict a defendant, the prosecution must prove, beyond a reasonable doubt, that the substance was generically methamphetamine. See ***United States v. Glover***, 97 F.3d 1345 (10th Cir. 1996). However, the type of methamphetamine is essential when it comes time for sentencing. See ***United States v. Kissick***, 69 F.3d 1048 (10th Cir. 1995) at 1057. This is especially so when the government alleges that the substance be treated, and a defendant's offense level be determined, as though the substance was "actual" or d-methamphetamine. The Third Circuit, in ***United States v. Bogusz***, 43 F.3d 82 (3rd Cir. 1994), held that the Government has the burden of production and persuasion, by a preponderance of the evidence, on the issue of whether the methamphetamine involved in the offense is D-methamphetamine or L-methamphetamine. ***See also***, ***United States v. Dudden***, 65 F.3d 1461 (9th Cir. 1995). Manufactured methamphetamine is not 100 percent pure regardless of the sophistication of the equipment. Therefore, the Government cannot assume that the methamphetamine

is pure (actual) methamphetamine without evidence at sentencing on how much methamphetamine hydrochloride is included in the mixture that constitutes the end product. ***Bogusz***, 43 F.3d at 88. The Third Circuit, as well as others that have addressed this issue, have held that the district court's failure to differentiate between D- and L-methamphetamine, in imposing a guideline sentence, constitutes plain error. ***Id***. at 89; ***United States v. Burt***, 76 F.3d 1064, 1069 (9th Cir. 1996); ***United States v. Ramsdale***, 61 F.3d 825 (11th Cir. 1995).

An ineffective assistance claim is designed to show counsel was ineffective in failing to properly address matters relevant to, in this case, sentencing proceedings. Counsel's failure to object to the different classification of methamphetamine isomer, or require the government to prove the type of methamphetamine isomer, significantly impaired Appellant from having his case properly decided by the District Court. His claim of ineffectiveness was not to shift the burden of proof required by the government, but to analogize it to his counsel's lack of preparedness in protecting the record and protecting his rights. This guideline distinction was available to counsel in the guidelines text itself. Therefore, emerging case law clarifying this issue does not relieve counsel of his obligation to address it.

Wherefore, it should have been the government's burden to show, or prove, the type of

methamphetamine isomer present in this case at sentencing. Since they could not show this, and admittedly could not, and have not, Petitioner's burden was, at the very least, lessened on remand for 2255 reconsideration.

The Rule of Lenity has to be construed in favor of a defendant where there is an ambiguity, both in a statute and a sentencing guideline application, both of which exist in this case and multiple courts have had conflicting dispositions concerning same.

CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for certiorari.

Respectfully submitted,

Arthur L. Wallace

Arthur L. Wallace
Attorney for Petitioner

App. 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

v.

ROBERT JESSE SMALLWOOD
(Name of Defendant)

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT
Case Number: SA-89-CR-301(1)

Charles Conaway
Defendant's Attorney
USAO #8904355

THE DEFENDANT:
(xx) pleaded guilty to count(s) 3 of the Indictment filed November 1, 1989
( ) was found guilty on count(s) _____
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	*Nature of Offense*	*Count Number(s)*
21 U.S.C. 841(d)(1)	*Possession of listed chemical with intent to manufacture a controlled substance*	*3*

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐The defendant has been found not guilty on count(s) ____ and is discharged as to such count(s).

☒ Count(s) 1 and 2 of the indictment (are) dismissed on the motion of the United States, as to this defendant.

☒ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☐It is ordered that the defendant shall pay a special assessment of $50, for count(s) One, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
463-98-5240

April 6, 1990
Date of Imposition of Sentence

Defendant's Mailing Address:
Comal County Jail #42708-080
New Braunfels, Texas

/s/ D. W. Suttle
Signature of Judicial Officer

D.W. Suttle, Senior District Judge
Name & Title of Judicial Officer

Defendant's residence address:
Comal County Jail #42708-080
New Braunfels, Texas

April 6, 1990
Date

Defendant: Robert Jesse Smallwood Judgment--Page 2 of 5
Case Number: SA-89-CR-301(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months. This sentence is to run consecutively to the sentence imposed in Cause No. SA-88-CR-308.

The court makes the following recommendations to the Bureau of Prisons:

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
- [ ] at _____ a.m./p.m. on _____.
- [ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
- [ ] before 2:00 p.m. on _____.
- [ ] As notified by the United States Marshal.
- [ ] As notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL
By:_____
Deputy Marshal

Defendant: Robert Jesse Smallwood Judgment--Page 3 of 5
Case Number: SA-89-CR-301(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

(xx) The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

(xx) The defendant shall not possess a firearm or other dangerous weapon.

(xx) The defendant shall pay any remaining fine balance at the direction of the U.S. Probation Officer.

(xx) The defendant shall refrain from the illegal use of any controlled substance (as defined in Section 102 of the Controlled Substance Act).

(xx) The defendant shall submit to periodic urine drug tests as directed by the U.S. Probation Officer **(Mandatory Condition).**

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1. The defendant shall not commit another Federal, state or local crime;
2. The defendant shall not leave the judicial district without the permission of the court or probation officer;
3. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5. The defendant shall support his or her dependents and meet other family responsibilities;
6. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;
8. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;

9. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
10. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
12. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

15. The defendant shall not use or possess methadone for treatment purposes, or in any other manner, shape or form, without express authority of the court.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $2,550, consisting of a fine of $2,500.00 and a special assessment of $50.00.

[ ] These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid

[ ] in full immediately.
[x] as follows: The special assessment shall be paid immediately to the Clerk, U.S. District Court. The fine shall be paid at the direction of the U.S. Probation Office.

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

App. 8

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

v.

ROBERT JESSE SMALLWOOD
(Name of Defendant)

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT
Case Number: SA-88-CR-308
USAO No. 8904355

Mr. Charles T. Conaway
Defendant's Attorney

THE DEFENDANT:
(xx) pleaded guilty to count(s) two of the superseding indictment on 11/6/89
( ) was found guilty on count(s) _____
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	*Nature of Offense*	*Count Number(s)*
21 U.S.C. 841(a)(1)	*Possession With Intent to Distribute Methamphetamine, a Schedule II Controlled Substance.*	*Two (2)*

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐The defendant has been found not guilty on count(s) ____ and is discharged as to such count(s).

☒ Count(s) 1 & 3 of the superseding indictment/& the original indictment (are) dismissed on the motion of the United States.

☒ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☐It is ordered that the defendant shall pay a special assessment of $50, for count(s) One, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
463-98-5240

January 30, 1990
Date of Imposition of Sentence

Defendant's Mailing Address:
Central Texas Parole Violators Facility
218 S. Laredo
San Antonio, Texas 78205

/s/ H.F. Garcia
Signature of Judicial Officer

H.F. Garcia
United States District Judge
Name & Title of Judicial Officer

Defendant's residence address:
Central Texas Parole Violators Facility
218 S. Laredo
San Antonio, Texas 78205

February 1, 1990
Date

Defendant: Robert Jesse Smallwood Judgment--Page 2 of 5
Case Number: SA-88-CR-308(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one hundred sixty eight (168) months.

The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at _____ a.m./p.m. on _____.

[ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2:00 p.m. on _____.

[ ] As notified by the United States Marshal.

[ ] As notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on 4-2-90 to FCI at Ashland, KY, with a certified copy of this judgment.

UNITED STATES MARSHAL

By:/s/ S. Smith

Deputy Marshal

000077 000005

Defendant: Robert Jesse Smallwood Judgment--Page 3 of 5
Case Number: SA-88-CR-308(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

( ) The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

(xx) The defendant shall not possess a firearm or other dangerous weapon.

(xx) The defendant shall pay the $2,500.00 fine in monthly installments of at least $45.00, the first installment to be paid upon the defendant's release from incarceration and later installments to be paid each month until the fine has been paid in full.

(xx) The defendant shall participate in a program approved by the U.S. Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1. The defendant shall not commit another Federal, state or local crime;
2. The defendant shall not leave the judicial district without the permission of the court or probation officer;
3. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5. The defendant shall support his or her dependents and meet other family responsibilities;
6. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;
8. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;

9. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
10. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
12. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

15. The defendant shall not use or possess methadone for treatment purposes, or in any other manner, shape or form, without express authority of the court.

Defendant: Robert Jesse Smallwood Judgment--Page 5 of 5
Case Number: SA-88-CR-308(1)

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the Clerk, U.S. District Court the sum of $2,550, consisting of a fine of $2,500.00 and a special assessment of $50.00.

[ ] These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid

[x] immediately.
[x] as follows: The $2,500.00 fine shall be paid in monthly installments of at least $45.00, the first installment to be paid upon the defendant's release from incarceration and later installments to be paid each month until the fine has been paid in full.

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50619
No. 95-50659
Summary Calendar

U.S. Court of Appeals
FILED
SEP 25 1996
Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT JESSE SMALLWOOD,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(SA-95-CA-0167 & SA-89-CR-301)

Before GARWOOD, JOLLY and DENNIS, Circuit Judges.*

PER CURIAM:

Robert Jesse Smallwood appeals from the district court's denial of his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. Smallwood argues that the district court followed improper procedure

* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

in denying his motion by shifting to him the burden of proof on the prejudice prong of his ineffective assistance of counsel claims and that he was entitled to an evidentiary hearing on the issue. We have reviewed the record and find no reversible error. The district court properly analyzed Smallwood's claim. Accordingly, we affirm essentially for the reasons adopted by the district court. *See United States v. Smallwood*, No. SA-95-CA-0167 (W.D. Tex. July 27, 1995); *see also United States v. Smallwood*, No. SA-95-CV-0166 (W.D. Tex. Aug. 7, 1995). Smallwood was not entitled to an evidentiary hearing. *See United States v. Acklen*, 47 F.3d 739, 743 (5th Cir. 1995); *United States v. Auten*, 632 F.2d 478, 480 (5th Cir. 1980). Smallwood abandons on appeal, by failing to brief the issue, his substantive claims of ineffective assistance of counsel. *Brinkmann v. Abner*, 813 F.2d 744, 748 (5th Cir. 1987); see Fed.R.App.P. 28(a)(6).

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50619
No. 95-50659

U.S. Court of Appeals
FILED
NOV 12 1996
Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT JESSE SMALLWOOD,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas, San Antonio

ON SUGGESTION FOR REHEARING EN BANC
(Opinion September 25, 1996, 5 Cir., F.3d)

Before GARWOOD, JOLLY and DENNIS, Circuit Judges.

PER CURIAM:

(xxx) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

REHG-6

FILED
JUN 16 1995

By GG Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT JESSE SMALLWOOD,	*	
	*	
Movant,	*	Cause No. SA-95-CA-0167
	*	[SA-88-CR-308(1)]
v.	*	*and*
	*	Cause No. SA-95-CA-0166
UNITED STATES OF AMERICA,	*	[SA-89-CR-301(1)]
	*	
Respondent.	*	

MEMORANDUM AND RECOMMENDATION

Robert Jesse Smallwood was convicted in SA-88-CR-308 of possession with intent to distribute methamphetamine and in SA0-89-CR-301 of possession of phenylacetic acid with intent to manufacture methamphetamine and was sentenced to serve consecutive 168-month and 120-month terms of imprisonment, respectively. He has filed a motion to vacate sentence, pursuant to Title 28 U.S.C. Section 2255, in each case contending that his counsel provided ineffective assistance in:

(1) failing to object to the trial court's calculation at sentencing of the base offense level without determining whether the methamphetamine was l-methamphetamine or d-methamphetamine.

(2) failing to argue to the court that using a theoretical yield of methamphetamine projected from a certain amount of precursor chemicals is not an appropriate method of computing a base offense level, and

(3) jointly representing him and his codefendant, which representation constituted a conflict of interest.

Having considered the argument of the parties and the applicable law, the Court is of the opinion the motions to vacate should be denied.

Statement of Facts

On November 28, 1988, law enforcement agents executed a federal search warrant at the residence of Smallwood and Deborah Bullock. (Transcript of Plea of Guilty, cause no. SA-88-CR-308, docket no. 43, p. 46). Agents discovered a non-operational clandestine laboratory for the manufacture of methamphetamine and seized a substantial quantity of precursor

chemicals, including phenylacetic acid, used in the manufacture of methamphetamine and amphetamine. (Id. at pp. 46-47). Smallwood told the agents that all of the chemicals, equipment and glassware were his, and that he and codefendant Marlin E. Bostdorf had previously manufactured methamphetamine at the residence. (Id. at p. 47). Located outside the residence was a truck, registered to Smallwood, in which was found a jar containing methamphetamine. (Id.). Smallwood was arrested that day, and was indicted for conspiracy to manufacture methamphetamine and for possession with intent to distribute methamphetamine in SA-88-CR-308. He was released on bond December 22. A superseding indictment was filed May 10, 1989 adding a third count of distribution of methamphetamine.

On October 25, 1989, surveillance agents observed Jeffrey Thompson obtain a 55-kilogram drum of phenylacetic acid (a precursor chemical to phenol-2-propanone (P2P), which is the immediate precursor to methamphetamine) and drive to Smallwood's residence. (Transcript of Re-arraignment, cause no. SA-89-CR-301, docket no. 22, pp. 35-36). Thompson was detained after leaving the residence driving a vehicle titled in Smallwood's name; personal papers of Smallwood and a gram of methamphetamine were found but not the phenylacetic acid. (Id. at p. 36). A search warrant was obtained and executed at Smallwood's residence on October 26. (Id.). Seized from the residence were the 55-kilogram drum of

phenylacetic acid, drug ledgers and a small amount of methamphetamine. (Id.). Smallwood admitted he procured Thompson to obtain and deliver to him the phenylacetic acid. (Id. at p. 37). In searching a small outbuilding in the rear of the residence, agents noticed the distinctive odor associated with the operation of a clandestine methamphetamine laboratory. (Id. at pp. 36-37). Smallwood was indicted in three counts with manufacturing methamphetamine, conspiracy to manufacture methamphetamine, and possession of a listed chemical (phenylacetic acid) with intent to manufacture methamphetamine in SA-89-CR-301.

On November 6, 1989, Smallwood pled guilty to possession with intent to distribute methamphetamine in SA-88-CR-308, and was subsequently sentenced to serve 168 months in prison. He also pled guilty to possession of a listed chemical with intent to manufacture methamphetamine in SA-89-CR-301 and received a consecutive sentence of 120 months. Smallwood appealed his conviction in SA-88-CR-308, which conviction and sentence were affirmed. *United States v. Smallwood,* 920 F.2d 1231 (5th Cir.), *cert. denied,* 501 U. S. 1238 (1991). his appeal in SA-89-CR-301 was rejected in an unpublished opinion. (Cause no. SA-89-CR-301, docket no. 26).

Sentencing Calculations

In SA-88-CR-308, the trial court accepted the conclusion in the presentence investigation report that

the base offense level was 34. (See Transcript of Sentencing, docket no. 43, pp. 52-53 and 56; docket no. 56, exh. B, p. 8). That level was computed by using Section 2D1.1 of the Sentencing Guidelines. The report indicated that the phenylacetic acid seized on November 28, 1988 could produce a practical yield of 30 pounds of methamphetamine. Using the drug equivalency table to convert the practical yield amount and the amount of actual methamphetamine seized, to an equivalent amount of cocaine, the base offense level of 34 was reached. The trial court rejected the argument of Smallwood's attorney that inclusion of the precursor chemicals was error because not all chemicals needed to manufacture methamphetamine were present.

In SA-89-CR-301, the trial court also adopted the calculation of the base offense level as set forth in the presentence investigation report. (See Transcript of Sentencing, docket no. 23, p. 12). The phenylacetic acid seized on October 26, 1989 would produce a practical yield of 15 pounds of methamphetamine which, when converted in the drug equivalency tables to cocaine, established a base offense level of 32. (Docket no. 35, exh. B, p. 7). Again, Section 2D1.1 of the Sentencing Guidelines was used. The same objection of Smallwood's attorney to the calculation (i.e., that not all chemicals needed to manufacture methamphetamine were present) was overruled. (See Transcript of Sentencing, docket no. 23, pp. 6-7).

Movant's Contentions

Smallwood contends that his trial attorney was ineffective in failing to require the government to establish the type of methamphetamine involved. Section 2D1.1 of the Sentencing Guidelines differentiates between methamphetamine (also known as d-methamphetamine) and l-methamphetamine, for which the punishment is much less severe.[1] The type can be determined by a polarity test on the methamphetamine seized. As for the use of precursor chemicals to project a yield of methamphetamine, Smallwood argues that no typing was possible, particularly in the absence of all required chemicals, and, therefore, the rule of lenity should be applied and the least restrictive punishment imposed.

Smallwood next argues that Section 2D1.11 not 2D1.1 should have been applied to his case. Section 2D1.11, which became effective November 1, 1991 specifically addresses the distribution and possession of a listed chemical, such as phenylacetic acid. Smallwood argues that a distinction must be made between a possessory interest in methamphetamine (to which Section 2D1.1 would apply) and a possessory interest in precursor chemicals (to which Section

---

[1] A proposed amendment, recently submitted to Congress, would eliminate the distinction between d-methamphetamine and l-methamphetamine in the Sentencing Guidelines.

2D1.11 would apply). He claims that remand for resentencing is appropriate.

Finally, Smallwood challenges his trial counsel's dual representation of him and Deborah Bullock in SA-89-CR-301. In that case, Bullock received an 18-month sentence for misprision of a felony, while Smallwood was sentenced to a term of 120 months to run consecutively to his 168-month sentence in SA-88-CR-308. He states that the trial court did not advise him of a potential conflict and that he did not waive his right to conflict-free representation. Smallwood argues that the conflict deprived him of the effective assistance of counsel.

Analysis

Before evaluating the merits of Smallwood's claims, the Court must address the government's argument that consideration of the claims is precluded. The government first suggests that the claims are not cognizable in a Section 2255 motion-to-vacate proceedings. Section 2255 provides relief if the federal petitioner can establish that: (1) his sentence was imposed in violation of the Constitution or laws of the United States, (2) the court was without jurisdiction to impose such sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack. Thus, it is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been

raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. *United States v. Segler*, 37 F.3d 1131, 1133 (5th Cir. 1994). Even a constitutional or jurisdictional claim is barred from collateral review unless the petitioner can demonstrate cause for failing to raise the issue on direct appeal and actual prejudice as a result of the alleged violation of federal law. *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991); *Segler*, 37 F.3d at 1133; *United States v. Shaid,* 937 F.2d 228, 232 (5th Cir. 1991). *cert. denied,* 502 U.S. 1076 (1992).

The government correctly points out that an allegation that the Sentencing Guidelines were erroneously applied cannot be raised in a Section 2255 proceeding. *Segler,* 37 F.3d at 1133-34. If Smallwood was now complaining of the trial court's actions in this regard, the motion to vacate sentence would be dismissed. However, he has raised the sentencing issues in the context of an ineffective assistance of counsel claim. Such claims obviously raise a constitutional question and, generally, cannot be litigated on direct appeal. *See United States v. Gibson,* Nos. 94-10084 and 94-10649, 1995 WL 331383 at *5 (5th Cir. June 5, 1995). Although Smallwood did not preserve the issues at the trial level which he now raises, ineffective assistance satisfies the cause and prejudice exception to procedural default. *United States v. Acklen,* 47 F.3d 739, 742 (5th Cir. 1995). Unlike the less onerous showing of trial court error on

direct appeal, Smallwood must carry the burden of meeting the standard for ineffective assistance claims in order to prevail. He can, however, present his complaints in this context.

Next, the government states that Smallwood did present the sentencing issues on direct appeal and is not entitled to seek reconsideration under Section 2255. *See Segler*, 37 F.3d at 1134. In his appeal in SA-88-CR-308, Smallwood argued that the inclusion of the practical yield of methamphetamine from the phenylacetic acid violated the letter and spirit of the Guidelines, because, in the absence of certain other essential precursors, he was not immediately prepared to produce methamphetamine. 920 F.2d at 1235-36. The Court of Appeals held that the calculation was proper, considering Smallwood's acknowledgment that he had previously manufactured methamphetamine and the circumstances (i.e., Smallwood's ownership of laboratory equipment and chemicals seized, as well as the distinctive odor associated with the manufacture of methamphetamine) evidencing his intent to continue production. 920 F.2d at 1237-38. Smallwood raised the same argument in his appeal in SA-89-CR-301, and again his contention was rejected. (Docket no. 26, pp. 5-7).

In his reply brief, Smallwood states that the Court of Appeals "specifically stated that it could not review the type of methamphetamine calculation because counsel had failed to raise it as an objection at the time

of sentencing." (Cause no. SA-88-CR-308, docket no. 61, p. 2; cause no. SA-89-CR-301, docket no. 41, p. 2). This Court found no reference in either appellate opinion to the arguments raised here. For that reason, consideration of the issues now is not precluded. The matters raised in the Section 2255 motions are not the same as those raised on appeal. Therefore, they shall be reviewed on their merits.

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in the case of *Strickland v. Washington:*

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

In order to establish that his counsel's performance was constitutionally deficient, a convicted defendant must show that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S.Ct. at 2064. In so doing, a convicted defendant must carry the burden of proof and overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. *Id.* at 689-91, 104 S.Ct. at 2065-66. The courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight. *Id.* at 689, 104 S.Ct. at 2065.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691, 104 S.Ct. at 2066. "Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692, 104 S.Ct. at 2067. In order to establish that he has sustained prejudice, the convicted defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. In the context of non-capital sentencing, the defendant must show that there is a probability that, but for counsel's

deficiency, the defendant's sentence would have been significantly less harsh. *Acklen,* 47 F.2d at 742.

However, it would be error to focus solely on outcome determination. *Lockhart v. Fretwell,* ___ U.S. ___, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993). The touchstone of an ineffective assistance of counsel claim is the fairness of the adversary proceeding. *Id.* at ___, 113 S.Ct. at 843. The *Strickland* test focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Id.* at ___, 113 S.Ct. at 844. Unreliability or unfairness does not result if the effectiveness of counsel does not deprive the defendant of any substantive or procedural rights to which he is entitled. *Id.*

1. Type of Methamphetamine

In *United States v. Acklen*, 47 F.3d 739 (5th Cir. 1995), the Court of Appeals considered the precise issue raised here, i.e., whether counsel's failure to raise, at the time of sentencing, the issue of the type of methamphetamine involved was ineffective assistance. In evaluating counsel's conduct, the Court noted "a remarkable difference in sentencing liability" between d-methamphetamine and l-methamphetamine, and stated that a mere reading of the commentary to Section 2D1.1 of the Sentencing Guidelines would have alerted counsel to the potentially significant

impact the type of methamphetamine can have on the sentence received. 47 F.3d at 743. The Court was not convicted, as a matter of law, that Acklen's trial counsel's performance was not deficient. *Id.*

The circumstances here are no different. The government offers no evidence or explanation as to the failure of Smallwood's counsel to raise the methamphetamine-type issue at sentencing. In SA-88-CR-308, Smallwood was sentenced based, in part, upon actual methamphetamine seized, not merely a projected yield. Whether this substance was d-methamphetamine or l-methamphetamine was never raised as a defensive issue. Failure to do so, in the absence of explanation, constitutes deficient performance.

As for the projected yield, the government argues that no determination is even possible, because no final product was manufactured. However, when the issue is raised by the defense at sentencing, the government bears the burden of proving that the substance involved was d-methamphetamine. *Acklen*, 47 F.3d at 742 n.4. Counsel's failure to require the government to meet this burden led to the trial court's assumption that d-methamphetamine was involved, and, thus, a greater sanction. Counsel could, and should, have argued that, in the absence of proof that Smallwood intended to manufacture and distribute d-methamphetamine, the trial court should have sentenced him under the rule of lenity, with the lesser sanction. Thus, in both cases,

the Court concludes that the deficiency element of the ineffective assistance of counsel claim regarding the type of methamphetamine has been satisfied.

Although the government once carried the burden of establishing the type of methamphetamine, Smallwood must prove prejudice in this Section 2255 proceeding. As the Court in *Acklen* noted, prejudice occurred if the drug involved was actually l-methamphetamine. 47 F.3d at 743. A mere conclusory allegation that the substance was l-methamphetamine is not sufficient. *Id.* In *Acklen*, the Court remanded the case to give the movant the opportunity to tender specific, verified evidence that the drug was, in fact, l-methamphetamine. *Id.* at 744. This procedure was followed because, in *Acklen*, the defendant claimed it was l-methamphetamine, the trial court proceeded on the assumption that l-methamphetamine was involved, and there was no clear opportunity for Acklen to establish the type of methamphetamine. *Id.*

While the same procedure could be utilized here, this Court does not believe it is warranted. Smallwood is aware of the *Acklen* decision, in that he cites to it in his reply briefs. At no time has he contended or offered proof that the actual methamphetamine seized was l-methamphetamine. In light of his burden to prove prejudice, his failure to make any showing that the drug was l-methamphetamine indicates that no such proof exists. Similarly, Smallwood does not attempt to

prove or even argue that he intended only to manufacture and distribute l-methamphetamine with the phenylacetic acid that was seized. Smallwood has had the clear opportunity to meet his burden, which was lacking in *Acklen*. In the absence of a preliminary showing by Smallwood as to the type of methamphetamine involved, neither discovery nor an evidentiary hearing is warranted. *See Acklen*, 47 F.3d at 744. Smallwood has failed to establish that he was prejudiced by his counsel's failure to raise this issue at sentencing.

2. Section 2D1.11

Section 2D1.11 of the Sentencing Guidelines, which became effective after the sentencing in these cases, creates a specific guideline for possession of a listed chemical. Smallwood points out that amendment 371, which established this provision, is deemed retroactive, pursuant to Section 1B1.10(c). Utilization of that provision would result in a lower base offense level than was applied when Smallwood was sentenced. Smallwood contends that Section 2D1.11 governs the real offense behavior in this case, and he seeks the benefit of the new provision. For several reasons, this claim lacks merit.

First, Smallwood does not explain how his attorney could be ineffective in failing to raise the issue of the application of a provision not in effect when Smallwood was sentenced. Therefore, his claim of

ineffective assistance of counsel must fail. However, a defendant can file a motion with the trial court to reduce his sentence, under Title 18 U.S.C. Section 3582(c), based upon a favorable post-sentencing change in the Sentencing Guidelines. Therefore, this Court will treat this issue as a request by Smallwood for a reduction of sentence. *See United States v. Mimms*, 43 F.3d 217, 219-20 (5th Cir. 1995).

The second reason Section 2D1.11 does not help Smallwood is the fact that, despite Section 1B1.10, the Fifth Circuit Court of Appeals has held that Section 2D1.11 is a substantive, rather than a clarifying, amendment and does not apply to conduct committed before its adoption. *United States v. Leed*, 981 F.2d 202, 207 (5th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 2971, 125 L.Ed.2d 669 (1993). In any event, Section 1B1.10 refers to amendments lowering the guideline range applicable to the defendant. As will be explained below, Section §2D1.1, which was applied to Smallwood at sentencing, is the most appropriate provision, not Section 2D1.11.

Section 2D1.11(c)(1) provides that Section §2D1.1 should be applied if the offense involved the manufacturing of or attempt to manufacture a controlled substance. As its title indicates, Section §2D1.1 applies not only to manufacturing and trafficking but also to possession with intent to commit those offenses. In SA-89-CR-301, Smallwood was convicted of possession of phenylacetic acid with intent

to manufacture methamphetamine. Section §2D1.1 specifically applies to that type of offense. *Leed*, 981 F.2d at 207. *See United States v. Surasky*, 974 F.2d 19 (5th Cir. 1992). The charge of possession of methamphetamine with intent to distribute (i.e., traffick) in SA-88-CR-308 likewise is covered by Section 2D1.1. Smallwood did not plead guilty to mere possession of a listed chemical, to which Section 2D1.11 would apply.

Furthermore, the undisputed facts establish that, in both cases, Smallwood was involved with the manufacturing of methamphetamine. As noted above, the opinions in both of his appeals confirmed that conclusion. Thus, the trial courts properly applied Section §2D1.1 in calculating Smallwood's base offense levels. No reduction in sentence, using Section 2D1.11, is warranted.

3. Conflict of Interest

In his final point of error, Smallwood contends that he was denied effective assistance in SA-89-CR-301 because his attorney also represented his codefendant Deborah Bullock. He states that the trial court failed to address him concerning the conflict as required by *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), and that he did not waive his right to conflict-free representation. Smallwood argues that the conflict is evidenced by the significantly greater punishment he received than Bullock and by the

representation to him that if he pled guilty, she would receive a lenient sentence.

Joint representation does not necessarily create a conflict of interest. *United States v. Rico*, 51 F.3d 495, 508 (5th Cir. 1995). To establish a claim of ineffective assistance based on conflict of interest, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Bullock v. Whitley*, No. 93-5526, 1995 WL 298985 at *4 (5th Cir. June 2, 1995). An actual conflict of interest exists whenever one defendant stands to gain significantly by advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing. *United States v. McCaskey*, 9 F.3d 368, 381 (5th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1565, 128 L.Ed.2d 211 91994). As with many other rights, the right to conflict-free counsel is not absolute and can be waived by a voluntary, knowing and intelligent waiver, if the conflict is not so severe as to undermine the integrity of the judicial system. *Rico*, 51 F.3d at 508.

Smallwood has failed to show that an actual conflict of interest existed between him and his codefendant. Bullock, Smallwood's common-law wife, pled guilty to misprision of a felony based upon her knowledge of Smallwood's manufacturing of methamphetamine at their residence in November, 1988. (Transcript of Rearraignment, docket no. 22, pp. 68-69). She subsequently received an 18-month

sentence. Smallwood claims that a promise of leniency for Bullock prompted his guilty plea. Assuming this is true, it does not demonstrate a conflict of interest. Smallwood offers no indication that Bullock benefitted to his detriment.

Whether or not Smallwood pled guilty, he would, in all likelihood, have been convicted of the 1989 offense. The phenylacetic acid, drug ledgers and a quantity of methamphetamine were found at his house. Agents noticed the distinctive odor associated with the manufacture of methamphetamine. Smallwood admitted he used Thompson to pick up the phenylacetic acid and deliver it to him. He offers no defense to the charge to which he pled guilty, which could have been advanced through separate attorney. His claim that joint representation precluded his attorney from arguing that his role in the offense was minimal is ludicrous, not only because of his overwhelming guilt, but also because Bullock pled to a crime arising from the 1988 seizure, not the 1989 seizure. Counsel certainly could have argued that Smallwood's role in the 1989 offense (for which Bullock was not charged) was minimal without increasing the culpability of Bullock for the 1988 offense. The longer sentence Smallwood received is attributable to his criminal history, repeated involvement with the manufacture of methamphetamine and the amount of illegal drugs; it was not a consequence of a benefit to Bullock at his expense. Having failed to establish an actual conflict

of interest, the issue of waiver need not be addressed.[2] *See United States v. Greig*, 976 F.2d 1018, 1022 (5th Cir. 1992) (trial court must conduct *Garcia* hearing only if alerted to the existence of an actual conflict of interest); *United States v. Medel*, 592 F.2d 1305, 1312-13 (5th Cir. 1979).

This Court is well aware that a conflict-of-interest allegation is serious and sometimes necessitates an evidentiary hearing. In *United States v. Santiago*, 993 F.2d 504 (5th Cir. 1993), the Court of Appeals remanded the case to this district court for a hearing on such a claim. In *Santiago*, the movant was represented by an attorney who, without movant's knowledge, also represented other individuals who were never prosecuted despite substantial evidence connecting them to the drugs which formed the basis for Santiago's conviction. 993 F.2d at 507. Here, Smallwood was aware of the dual representation. Additionally, as noted above, Bullock pled guilty to a separate offense. There is no credence to Smallwood's theory that his conviction resulted from his counsel's willingness to sacrifice him in exchange for leniency to Bullock. In the absence of some facts supporting the existence of an actual conflict of interest, an evidentiary hearing is not warranted.

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[2] The record does not reflect that a *Garcia* colloquy was conducted or that Smallwood waived his right to conflict-free representation.

Recommendation

It is, therefore, the recommendation of the Magistrate Judge that Smallwood's motions to vacate sentence be **DENIED**.

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to Title 28 U.S.C. Section 636(b)(1), any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections. *Such party shall file the objections with the clerk of the court, and serve the objections on the Magistrate Judge and on all other parties.* A party's failure to file such objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the District Court. *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. 1982). *See Thomas v. Arn*, 474 U.S. 140, 150,

106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court, except upon grounds of plain error or manifest injustice. *Nettles*, 677 F.2d at 410.

SIGNED this 16th day of June, 1995.

/s/ John W. Primomo
JOHN W. PRIMOMO
United States Magistrate Judge

FILED
JUL 27 1995

By TR Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT JESSE SMALLWOOD,	*	
	*	
Movant,	*	CIVIL NO. SA-95-CA-167
	*	[SA-88-CR-308(1)]
v.	*	
	*	
UNITED STATES OF AMERICA,	*	
	*	
Respondent.	*	

ORDER

On this day, the Court considered Movant's motion to vacate sentence filed pursuant to Title 28 U.S.C. Section 2255, contending that he received ineffective assistance of counsel. The Court also considered the June 16, 1995 Memorandum and Recommendation of the United States Magistrate Judge John W. Primomo, and the entire record.

After reviewing the pertinent legal authorities in light of the entire record, the Magistrate Judge recommended that Movant's motion to vacate should

be DENIED. After having conducted an independent review of the entire record in this cause as required by Title 28 U.S.C. Section 636(b)(1)(C), the Court hereby accepts, approves, and adopts the Magistrate Judge's factual findings and legal conclusions contained in his Memorandum and Recommendation. The Court agrees with the Magistrate Judge's June 16, 1995 Recommendation.

It is ORDERED that Movant's motion to vacate be DENIED.

SIGNED this 27th day of July, 1995.

/s/ H. F. Garcia
H. F. GARCIA
United States District Judge

FILED
AUG 7 1995

By TR Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT JESSE SMALLWOOD,	*	
	*	
Movant,	*	CRIM. NO. SA-89-CR-301
	*	CIVIL NO. SA-95-CA-166
v.	*	
	*	
UNITED STATES OF AMERICA,	*	
	*	
Respondent.	*	

ORDER

Pending before the Court is the Motion to Vacate, Set Aside or Correct Sentence filed by Robert Jesse Smallwood, Movant, pursuant to 28 U.S.C. 2255 in the above-styled and numbered cause on February 22, 1995. Therein, Movant claims he received ineffective assistance of counsel. Specifically, he claims that counsel

1. failed to object to the Court's calculation at sentencing of the base offense level without

determining whether the methamphetamine was l-methamphetamine or d-methamphetamine,

2. failed to argue to the Court that using a theoretical yield of methamphetamine projected from a certain amount of precursor chemicals is not an appropriate method of computing a base offense level, and

3. jointly represented him and his codefendant, Deborah Bullock, which representation constituted a conflict of interest.[1]

Also before the Court is the Government's response filed on May 5, 1995 and the reply filed by Movant on May 23, 1995. Having considered the same and the Memorandum and Recommendation filed by United States Magistrate Judge John W. Primomo on June 19, 1995, as well as the objections filed by Movant on June 28, 1995, and, after conducting an independent review of the record in this cause, and having made a de novo determination with respect to those portions of the Magistrate Judge's Memorandum and Recommendation to which objections have been made, as required by 28 U.S.C. 636(b)(1)(C), the Court

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[1] Movant concedes in his objections that the Magistrate Judge's finding that defense counsel did not operate under a conflict of interest is correct. *See* Movant's Objections to the Magistrate Report, page 8.

hereby accepts and approves the Magistrate Judge's findings and recommendation.

Accordingly, it is ORDERED that the Motion to Vacate, Set Aside, or Correct Sentence be, and the same is hereby, DENIED.

SIGNED this 7th day of August, 1995.

/s/ D. W. Suttle
D.W. SUTTLE
Senior United States District Judge